No. 71-508

In the Supreme Court of the United States

OCTOBER TERM, 1971

RALPH J. HEMMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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Petitioner brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), seeking to recover for personal injuries sustained allegedly as a result of not being notified by the Army that he had contracted tuberculosis while on active duty.

X-rays taken of petitioner's chest at the Seneca Army Depot on October 7, 1963 showed that he had active tuberculosis. The report on these x-rays, however, prepared by an Army doctor, failed to indicate the disease and petitioner was accordingly not informed of his condition. On November 14, 1963, petitioner was discharged from the Army with a certificate indicating that he was physically qualified

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for re-enlistment without re-examination within a six-month period. Petitioner's condition was subsequently diagnosed by a private physician. Petitioner alleged essentially that the Army doctor negligently read the x-rays, negligently failed to inform him of his condition, and that the Army negligently issued him a certificate of discharge indicating that he was physically qualified for re-enlistment without re-examination. The district court granted the United States summary judgment with respect to the above allegations of negligence (Pet. 22)[1] and the court of appeals affirmed (Pet. 13–20), on the authority of *Feres* v. *United States*, 340 U.S. 135.

In *Feres*, this Court held that the government is not liable under the Federal Tort Claims Act for injuries to members of the armed forces sustained incident to the military service. Like petitioner, two of the claimants involved in *Feres* (Griggs and Jefferson) sustained injuries allegedly caused by the medical malpractice of military doctors at military medical facilities. Moreover, one of the claims considered in *Feres*, like that of petitioner, arose from an injury which was not discovered until after the soldier had been discharged from the military service (340 U.S. at 137). Since the operative facts of this case are similar to those in *Feres*, the court below correctly dismissed petitioner's claim.

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[1] The court allowed petitioner to amend his complaint with regard to allegations of negligence in connection with the treatment petitioner received subsequent to his discharge from the Veterans Administration (Pet. 23). Those issues are not now before the Court.

Contrary to petitioner's assertion (Pet. 10–12), there is also no conflict with *United States* v. *Brown,* 348 U.S. 110. In *Brown* an action had been brought by a veteran who had been the victim of medical malpractice *after* his release from service. *Feres* was inapplicable there because, unlike the instant case, the injuries had not been incurred incident to military service.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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